PEDAC HOLDINGS (S) PTE. LTD.

v.

FIRST NOODLE SHOP PTE. LTD.

HIGH COURT, SINGAPORE
YONG PUNG HOW J
[SUIT NO. 1235 OF 1989]
28 FEBRUARY 1990

LAND LAW: *Lease - Fixed term - Rental payable - Default - Delivery up of premises.*

EVIDENCE: *Written contract contrary to oral agreement - Use of extrinsic evidence - Exclusion of oral by documentary evidence - Whether within exception.*

The plaintiffs are the owners of the premises known as 150 South Bridge #07-01, Fook Hai Building, Singapore 0105 ("the premises"). By a lease in writing dated 28 February 1988, the premises were let to defendants for the business of a restaurant for a term of 3 years from 1 June 1988 or from the date of commencement of the defendants business, whichever was earlier. The rent was made up of 2 elements: a fixed minimum rent of $4,000 per month, and a percentage rent which was the amount by which 10 per cent of the defendants' monthly gross sales exceeded the fixed minimum rent payable for the month. There was the usual proviso for forfeiture should any rent or part thereof remain unpaid for 14 days whether formally demanded or not.

In addition to the rent, the defendants covenanted under the lease to pay the maintenance charges for the premises levied by the management corporation of the building, which were later fixed at $6,000 per month; also to pay interest on any arrears of rent at 10 per cent per annum from the due dates of payment or recovery, with such interest to be treated as arrears of rent.

The defendants having defaulted on various payments under the lease, the plaintiffs issued a writ on 28 June 1989, and followed this with a summons under O. 14 r. 3 claiming possession of the premises; payment of arrears of rent which as at 30 April 1989 had amounted to $103,844.43; arrears of rent for May and June 1989 and interest thereon; mesne profits from 1 July 1989; balance of maintenance charges as at 31 May 1989 amounting to $2,000 and arrears of maintenance charges from 1 June 1989 together with interest thereon. The plaintiffs' case rested on the written lease dated 28 February 1988. The Registrar gave judgment for the plaintiffs.

The defendants appealed to a Judge in chambers under O. 56 against the decision of the Registrar ordering in favour of the plaintiffs possession and delivery up of premises and payment of arrears of rent, mesne profits, maintenance charges, interest thereon and costs. The defendants' case was based on the 3 affidavit filed by the defendants' managing director, Cheng Lip Kwong on 12 August 1989, 7 September 1989 and 25 September 1989. The defendants wished to introduce extrinsic evidence to show that the terms of lease did not reflect what the parties intended and agreed to.

The extrinsic evidence which the defendant sought to introduce was set out in Clause 12, paras. (1), (2), (5), (8A), (9), (10) and (11) of Cheng Lip Kwong's first affidavit of 12 August 1989.

The plaintiffs' case on this issue was that the rent and management charges must be ascertained from the provisions of the lease dated 28 February 1988. Extrinsic evidence to vary the import of these provisions would not be admissible because of ss. 93 and 94 of the Evidence Act.

The defendants contended that their case fell within exception (c) of s. 94 which provides that 'the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.'

Held:

[1] The defendants failed to prove the existence of a separate oral agreement. The only reasonable inference to be drawn from them is that the formula for the payment of rent was discussed before the lease was executed, as would only be expected, and the terms of the tenancy as set out in the lease reflected the final consensus between the parties.

[2] The appeal was misconceived and without merit.

[Appeal dismissed.]

Cases referred to:

City and Westminster Properties [1934] Ltd. v. Mudd [1959] 1 Ch 129
Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros. [1980] 2 MLJ 16

Legislation referred to:

Evidence Act (Cap 97) [Sing], ss. 93, 94
Evidence Act 1950, ss. 91, 92

For the appellant/defendants - P. Suppiah; M/s. P. Suppiah & Co.
For the respondents/plaintiffs - Harish Kumar; M/s. Chor Pee & Co.

JUDGMENT

Yong Pung How J:

This was an appeal of the defendants to a Judge in chambers under O. 56 against the decision of a Registrar ordering in favour of the plaintiffs possession and delivery up of premises, and payment of arrears of rent, mesne profits, maintenance charges, interest thereon and costs.

The plaintiffs are the owners of the premises known as 150 South Bridge #07-01, Fook Hai Building, Singapore 0105 ("the premises"). By a lease in writing dated 28 February 1988, the premises was let to the defendants for the business of a restaurant for a term of 3 years from 1 June 1988 or from the date of commencement of the defendant's business, whichever was earlier. The rent was made up of 2 elements: a fixed minimum rent of $4,000 per month, and a percentage rent which was the amount by which 10 per cent of the defendants' monthly gross sales exceeded the fixed minimum rent payable for the month. The fixed minimum rent was payable in advance on or before the first day of every month, and the percentage rent was payable after computation within 10 days of the expiration of each month. There was the usual proviso for forfeiture should any rent or part thereof remain unpaid for 14 days whether formally demanded or not.

In addition to the rent, the defendants covenanted under the lease to pay the maintenance charges for the premises levied by the management corporation of the building, which were later fixed at $6,000 per month; also to pay interest on any arrears of rent at 10 per cent per annum from the due dates of payment or recovery, with such interest to be treated as arrears of rent.

The defendants having defaulted on various payments under the lease, the plaintiffs issued a writ on 28 June 1989, and followed this with a summons under O. 14 r. 3 claiming possession of the premises; payment of arrears of rent which as at 30 April 1989 had amounted to $103,844.43; arrears of rent for May and June 1989 and interest thereon; mesne profits from 1 July 1989; balance of maintenance charges as at 31 May 1989 amounting to $2,000 and arrears of maintenance charges from 1 June 1989 together with interest thereon. The plaintiffs' case rested simply on the written lease dated 28 February 1988. The defendants were in arrears with their payments of the rent under Clause 1(1) for more than 14 days, and also the maintenance charges under Clause 3(36). Consequently it was lawful for the plaintiffs as the landlord to re-enter upon the premises under Clause 5(1) and to determine the tenancy.

At the first hearing of the summons before the Registrar on 14 August 1989, however, the defendants were given unconditional leave to defend the action. The Registrar was apparently influenced by the tortuous averments in a lengthy affidavit filed by the defendants only on 12 August 1989. Briefly, these alleged in essence that the lease did not correctly represent the terms agreed between the parties, because, in the negotiations before the execution of the lease, other collateral terms had been agreed to. In particular, the fixed minimum rent was not $4,000 per month, but was $10,000 because it included the maintenance charge of $6,000 per month. The implication of this was that it would only be over this higher threshold that the percentage rent would be calculated.

On the following day, 15 August 1989, the plaintiffs sought leave to present further arguments before the Registrar's order was perfected. At the further hearing on 8 September 1989 the plaintiffs drew attention to the provisions of ss. 93 and 94 of the Evidence Act Cap. 97 which had not been considered at the earlier hearing. If they had been considered, the plaintiffs contended that the evidence of other collateral terms which the defendants sought to introduce to vary the terms of the lease would not have been admissible, and that would have led to a different order by the Registrar. In the result, having re-considered the evidence in the light of these sections of the Evidence Act, the Registrar found that there were no triable issues, nor was there any reason why there should be a trial, and he gave judgment for the plaintiffs. Against this decision the defendants appealed to a Judge in chambers under O. 56.

Before me at the hearing of the appeal on 30 January 1990 the defendants' case was based on the 3 affidavits filed by the defendants' managing director, Cheng Lip Kwong on 12 August 1989, 7 September 1989 and 25 September 1989. The averments set out the background events which preceded the execution of the lease; they also included a veritable litany of business woes, from the malfunction of the cooking equipment and the flooding of the toilets, to the problem with their Hong Kong chefs and their intentions to counterclaim in broad figures of $25,000 for improvements, $60,000 for loss of staff, and another $552,000 for financial losses which they had incurred for the 12 month period from July 1988 to June 1989 at $46,000 per month.

The real issue which could be extracted from three affidavits, however, was set out in para. 21 of the first affidavit of 12 August 1989 filed by the defendants' managing director, Cheng Lip Kwong:

> 21. The crux of the issue is as follows. The plaintiffs say that the rental is $4,000 and if 10% of the gross takings exceeds $4,000 then the excess is to be paid as rental and in addition monthly maintenance charges of $6,000 has to be paid. The defendants say that the minimum rental is $10,000 which includes maintenance charges and if the gross sales exceed $10,000 then the excess is to be paid as rental. Strictly speaking the only dispute is in the maintenance, whether it is included in the $10,000 or whether it is a separate item.

It is to be noted that the defendants did not dispute the quantum of the maintenance charges *per se*, but contended in effect that the amount of the maintenance charges should be included in the formula, and added to the fixed minimum rent to raise the threshold beyond which the percentage rent is to be calculated. The defendants therefore wished to introduce extrinsic evidence to show that the terms of the lease did not reflect what the parties intended and agreed to.

The plaintiffs' case on this issue was that the rent and management charges must be ascertained from the provisions of the lease dated 28 February 1988; Clause 1 set out the formula for calculating the rent made up of two elements, and under Clause 3(36) the defendants as the tenant covenanted "to pay all maintenance charges levied by the management corporation of the building or whosoever is responsible for the maintenance of the building. "Extrinsic evidence to vary the import of these provisions would not be admissible because of ss. 93 and 94 of the Evidence Act.

The extrinsic evidence which the defendants sought to introduce was set out in Clause 12 paras. (1), (2), (5), (8A), (9), (10) and (11) of Cheng Lip Kwong's first affidavit of 12 August 1989:

(1) Sometime in June 1987 one Mr. Bernard Teo and another Mr. Chiam acting as agents for and on behalf of the plaintiffs offered to rent out the said premises to the defendants for use as a restaurant with the existing equipments in the kitchen, which included cooking ranges, stoves, ovens, coldroom and refrigerators at $10,000 per month plus a variable monthly rental of 10% of the gross sales of the restaurant and if such gross sales exceeds $10,000 then the excess is to be added on to the $10,000.

(2) No other payments were involved.

(5) Subsequently, the defendants met one Mr. Chua Hwee Hock, an executive of the plaintiffs, together with the said agents when the said Mr. Chua confirmed the said offer mentioned in para. 12(1) above and he further confirmed that no other charges were payable and that the said $10,000 would include maintenance charges.

(8A) The defendants paid $30,000 on 18 February 1988 by OUB cheque no. 927452 being three months' rental and maintenance deposit at $10,000 per month for the lease.

(9) The said lease prepared by the plaintiffs was given to the defendants sometime in February 1988. The defendants noted that the said lease did not reflect the original understanding. In the Lease, "maintenance charges" have been mentioned and a minimum rental of $4,000, plus 10% of the gross sales. It stated the variable rental was to be paid if it exceeds $4,000. The defendants as a result sent a letter dated 4 February 1988 to the plaintiffs for clarification.

(10) The said Mr Chua called the defendants to meet him at his office and explained that it was only the lawyers' way of drafting it and scribbled on a piece of paper that the basis of the agreement had not changed and it was as set out in para. 12(1) above.

(11) After the said Mr Chua had given the said assurance the defendants signed the said lease.

The letter to Chua Hwee Hock dated 4 February 1988, which was referred to in para. (9) and was exhibited to the affidavit, consisted of 2 sentences as follows:

First Noodle Shop Pte Ltd.

4 February 1988
To: Ambassador Holdings Ltd.
Attn: Mr Chua Hwee Hock

Re: #07-01 Fook Hai Building 150 South Bridge Road

Further to our telephone conversation of today, attached is a copy of the lease.

Please take a look at p. 2 Clause (1) and p. 19 Clause 3(36).

Regards,

C H Tan

Ambassador Holdings Ltd., it was explained by Counsel, was the holding company of the plaintiffs. It was not explained who was CH Tan, the signatory to the letter. The clauses referred to in the attached copy of the draft lease were identified with the corresponding clauses in the lease signed later.

The "scribbled paper", which was referred to in para. (10) and a photocopy of which was also exhibited to the affidavit, showed 13 figures which had been "scribbled" on the paper in the full sense of the term. The paper contained no explanation whatsoever of these figures, and it was unsigned.

The law on the exclusion of oral by documentary evidence is covered by ss. 93 and 94 of the Evidence Act which, for convenience, are set out below:

> 93. When the terms of a contract or a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of documents, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

> 94. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s. 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contracting, varying, adding to, or subtracting from its terms.

To s. 94, there are 6 exceptions which mirror the common law exceptions. Before the Registrar, Mr. Suppiah for the defendants had contended that exception (a) could be relied upon in this case to permit extrinsic evidence to be admitted, in that there could be a situation here in which there was fraud, although fraud had never been alleged. This contention was not repeated before me, but Mr. Suppiah argued this time that the defendants' case fell within exception (c) which provides that:

> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

In view of the vast number of judicial decisions on the subject of the exclusion of oral evidence by documentary evidence, I shall confine myself to dealing only with the main authorities cited before me. Mr. Suppiah cited in support the English case of *City and Westminster Properties* [1934] *Ltd v. Mudd* [1959] 1 Ch 129. In that case, a tenant lived at the premises in breach of a covenant "to use the demised premises as and for showrooms, workrooms and offices only...", and was given notice to quit. Before the lease was executed, however, the plaintiffs' agent had told the defendant orally that, if he signed the lease, the plaintiffs would make no objection to his continuing to reside there. In dismissing the action for forfeiture of the lease on the ground of breach of covenant, Harman J said at p. 145:

> If the defendant's evidence is to be accepted, as I hold it is, it is a case of a promise made to him before the execution of the lease that, if he would execute it in the form put before him, the landlord would not seek to enforce against him personally the covenant about using the property as a shop only. The defendant says that it was in reliance on this promise that he executed the lease and entered on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile.

Mr. Suppiah also cited the Malaysian Federal Court decision in *Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros* [1980] 2 MLJ 16. In that case, the landlords had orally agreed to allow the tenants to occupy the premises for as long as they wished on payment of $14,000 as tea money. Tenancy agreements were executed later which did not refer to the landlords' promise. A dispute arose as to payment of rent and the landlords eventually sued for vacant possession, arrears of rent, mesne profits and damages. In their defence, the tenants claimed that, under the oral agreement, they were entitled to stay in the premises as long as they wished and so long as they paid the rent regularly. On the landlords appealing against the trial Judge's dismissal of their claim, the question which arose was whether evidence of the oral promise could be given in view of ss. 91 and 92 of the Malaysian Evidence Act. These sections enact that extrinsic evidence is not admissible to vary or qualify the terms of a written contract and are identical with s. 93 and 94 of the Evidence Act in Singapore. The Federal Court held that the oral promise given by the landlords at the time of entering into the contract constituted a separate collateral contract which was not imported into the main agreement, but existed side by side with it, and did not offend the rule against extrinsic evidence.

The *Westminster Properties* case and the *Tan Swee Hoe Co. Ltd.* case appear to fall within the ambit of exception (c) to our s. 94. They can be clearly distinguished from our instant case, in which the facts are materially different. Even if the defendants' claims are given due consideration, they do not go so far as to prove the existence of a separate oral agreement. The only reasonable inference to be drawn from them is that the formula for the payment of rent was discussed before the lease was executed, as would only be expected, and the terms of the tenancy as set out in the lease reflected the final consensus between the parties. This consensus covered the formula for the payment of rent in two parts in Clause 1(1) of the lease, and the separate provision in the form of a tenant's covenant in Clause 3(36) for the payment of the maintenance charges to be levied by the management corporation of the building or whoever would be responsible for the maintenance of the building. The rent and the management charges to be paid under a lease are by far the most important of the matters to be considered and agreed upon by a tenant once the premises themselves have been agreed upon. For the defendants to suggest now, on the flimsy evidence which they have offered, that the rent stated in the lease did not reflect what the parties had allegedly agreed orally, and should have been vastly different and included the maintenance charges, is to stretch judicial credulity unnecessarily.

What is reasonably clear, even from the evidence in the 3 affidavits of Cheng Lip Kwong, the defendants' managing director, is that after the lease was entered into by the defendants, the business of the restaurant did not pick up for a long time. Thus, the defendants were on their own admission already in arrears with payments from the beginning, and some consideration and concessions had to be given to them by the plaintiffs to help them out.

But the restaurant business has picked up considerably in recent months, as has been the position with the restaurant business all over the island, and it has become worthwhile even to pay the double rent which has been ordered by the Registrar. Be that as it may, the appeal was in my judgment misconceived and without merit, and was dismissed with costs.

Also found at [1990] 1 CLJ 1042